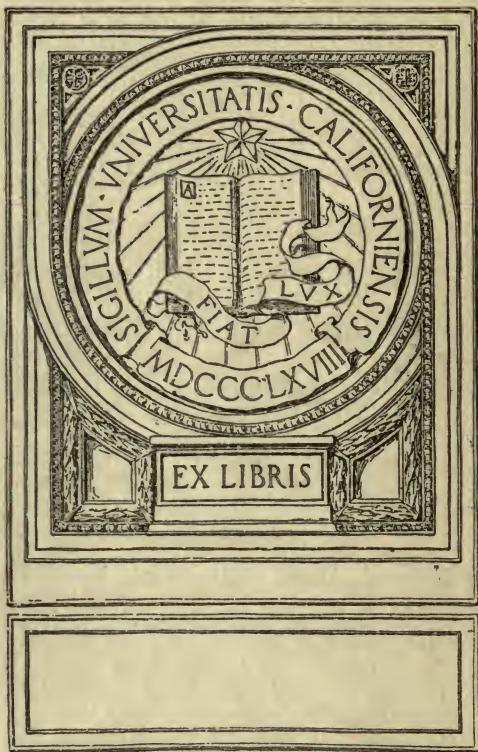


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# ON PUNISHMENT

A MODERN VIEW OF THE RATIONAL  
TREATMENT OF CRIME

*red*

BY

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## CONTENTS

|                                                              | PAGE |
|--------------------------------------------------------------|------|
| 1. ON PUNISHMENT .. .. .                                     | 9    |
| 2. ON RECLAMATION AS A PENOLOGICAL<br>METHOD.. .. .          | 15   |
| 3. THE TREATMENT OF HOMICIDAL CRIME                          | 22   |
| 4. THE LAW ON ITS TRIAL: AN HISTORICAL<br>RETROSPECT .. .. . | 34   |
| 5. CRIME AND SOCIAL RESPONSIBILITY ..                        | 45   |
| 6. ON FLOGGING .. .. .                                       | 52   |



## AUTHOR'S NOTE.

THE following pages do not pretend to constitute in any sense an exhaustive treatise on crime. They are the outcome of a good many years pursuit and consideration of the criminal problem. The hundred and fifty thousand fellow-creatures who, in England and Wales, are annually convicted of crime, constitute a blot on the social system, an open social sore. No doubt amongst these many are vicious and depraved, many are also weak-minded, most are the product of evil conditions. I venture to think that there are few problems that should appeal to thoughtful and humane men and women as this should do. And it is the duty of all those who give thought and study to this question to give expression to their thoughts so that, perchance, a better way may be found, and a social system presently evolved which shall not be fitted to the survival of the criminal.

Some of the pages which follow have previously appeared and been published in articles appearing in the *International Journal of Ethics*, the *Westminster Review* and the *Humane Review*, to the Editors of which I am indebted for their permission to reproduce the same.

C. H.

NO. 7140  
ANNOUNCED

## I.—ON PUNISHMENT.

*" La législation pénale pourra être appelée humaine quand elle tendra, non à punir par la souffrance ou l'infamie, mais à solliciter un coupable aux actes qui en feraient un nouvel homme."*

ALFRED DUMESNIL.

AFTER many years of effort on the part of reformers in respect to the Criminal Law, and of the partial success of humanitarians in moderating the ferocity of its execution and in affecting a change in some of the accepted theories as to its basis and ultimate purpose, a recent set-back, born of some wave of popular sentimentalism, shows the recurrent social need of urging upon the consideration of thoughtful people the question, "What do you regard as the object in view in the punishment of wrongdoers and the just and effective method of attaining this object, consistent with modern principles of social ethics, heredity, and the known facts of physiological and psychological science?"

The answer which nine out of ten men will give to the first part of this query, based on the commonly accepted doctrine in regard to punishment, is, that it is inflicted with a view to the protection of society and to deter others from like offences. This is the theoretical explanation. Actually the evidence which every terrible

crime, or series of crimes, brings forth, goes to show that the root idea in the minds of a very large number of persons is still one of revenge. "Such people," it is said, "deserve no mercy, such criminals should be hanged or flogged or sent to penal servitude."\* This cry for the cat or the gallows is a cry for vengeance and has no real relation to the theory of deterrent punishment, as to which, the evidence against violent penalties for crime, is overwhelming.

Vengeance is one of the oldest of human passions. All penal systems begin with it. To deter and to reform are growths of a later stage. "Even now," says John Galsworthy, "the State still feels that because a man has hurt it, it must hurt him." Blood for blood, suffering for suffering, feud for feud, is the first and most ancient of tribal instincts. At bottom, it is, no doubt a primitive instinct of self-preservation. That which conduces to the preservation of the tribe is good. That which attacks its preservation is bad, and when violent, is, in the nature of things, to be paid back with violence.

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\* "It was complained that the punishment was degrading and painful. So it ought to be. Men who committed these offences had lost all manly instincts. They were not men; they were animals, and must be treated as animals."—COLONEL LOCKWOOD, M.P., House of Commons, November 1st, 1912.

"He was only glad these people had got a skin to be tanned."—MR. WILL CROOKS, M.P., *Ibid.*

"He was ready in his own person to run the risk of being flogged sooner than that there was the slightest chance of any of these miscreants escaping a punishment which it was agreed they so richly deserved."—LORD WILLOUGHBY DE BROKE, House of Lords, November 28th, 1912.

"In all cases of brutal assault with violence, the punishment should be at least fifty lashes."—SIR CHAS. MORRISON-BELL, *Morning Post*, October 29th, 1912.

Hence arises a simple social morality based on acceptance of what is serviceable to the strong or surviving tribe. And hence, too, crime in the earliest societies is that which is anti-tribal, a thing to be met with stern repression, not on moral grounds but of sheer necessity.

The next step in penological evolution is the introduction of the idea of punishment.

This idea of punishment has about it originally a semi-theological atmosphere. It is "a sort of sacrifice to the goddess of Justice"\* and has in it a notion of balancing so much wrongdoing by so much suffering. Those acts which prove contrary to the primitive social serviceability, and which by habit have come to be regarded in the race mind as immoral, are in the nature of things in opposition to the tribal deity, who typifies the effort to concrete the abstract idea of power, of power that is, exercised on behalf of the tribe and the racial purpose. The deity demonstrates his authority by inflicting suffering for opposition. Presently it becomes his *duty* to do so, or the duty of his ministers.

This marks the first stage of punishment.

The doctrine of punishment inflicted not as a moral necessity but with a view to its deterrent quality is of much later development. It marks a loss of tribal unity and a sense of a new individualism. Society has become "itself stricken with fear, trying to stamp out criminality by fear."† The individual demands protection from the community against other individuals who threaten his well-being or safety or existence. Society is called upon to act as the frightened

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\* Edward Carpenter : *Prisons, Police and Punishment*.

† Edward Carpenter.

or injured individual himself would act, and endeavours to strike fear into the hearts of ill-doers by the terror of its punishments.

From thence onward, all three notions become confused—punishment for pure revenge, punishment for desert, and punishment for deterrent purposes. These become further confused by the unbalanced nature of the advances made in the progress of civilization. One or other notion rises to the surface in penal practice as the sentiment of the day or the moment dictates, modified by and varying with the intelligence of judge, magistrate, and public.

For because of the want of any deep consideration of the whole problem of criminality, the most civilized societies are constantly reverting in the strangest of ways to the most primitive and the most brutal of actual practices. Students of criminology are but too painfully aware how readily, at each crisis, all kinds of men and women call for reversion to outworn methods of violence, especially for those two vicious remnants of mediæval penology, flogging and the death penalty. To determine the sentimentalists in this respect, it is but necessary to recall the apt words of a recent writer in the *Nation*—"By their whips shall ye know them."

And yet crime has never been lessened by resort to violence. The diminution of crime depends, not on deterrent punishment, not on punishment at all, but on "wide and impalpable influences, growth of social feeling, spread of education, betterment of manners, decrease of intemperance, improvement in housing,"\* in a word on a hundred

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\* John Galsworthy : *The Spirit of Punishment*.

constructive social elements, hand in hand with an ever-increasing betterment in the treatment of the criminal himself, in moderation of the penal law, abolition of capital and corporal punishments, brandings, ear-croppings, stocks, thumbscrews, gibbetings and treadmills. And with this has also come an era of scientific and humane method, the introduction of suitable and intelligent work, clean habitations, better food, Borstal systems and general efforts at reclamation. "The barbarous penal code," said King Edward VII. at the opening of the new Central Criminal Court in 1907, "which was deemed necessary a hundred years ago, has gradually been replaced in the progress towards a higher civilization by laws breathing a more humane spirit and aiming at a nobler purpose." At the same time, and *pari passu* with this humanising of the law, a recent official document tells us that the members of the predatory classes are appreciably fewer than in 1857, in spite of the fact that in the interim the population has nearly doubled.\*

Yet so rooted are the old ideas that we cannot release our hold upon them, cannot, in spite of the appalling evidence of recidivism,† relinquish the notion that by the use of force we can and will put down crime, cannot bring ourselves to admit the true facts of the disease-nature and the social character of criminality and the duty, the sole rational duty of any intelligent community towards this disease. This duty is, obviously, to seek a cure by patient experiment, as with all disease, and to abandon not only the primitive

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\* *Criminal Statistics*, Part I., 1908 : Review of the Progress of Crime since 1857.

† See page 17.

methods of revenge which belong to the age of human childhood, but punishment for desert, for this assumes some divine power of judgment and knowledge of the hearts of men, and for deterrence, which is rarely efficacious, and to find the way to reclaim, reform and restore the criminal to society, a healthy and a sane unit. If the criminal cannot answer to the efforts at reclamation, cannot, in short, be cured, and such will prove a diminishing number, then, and then only, he needs to be segregated permanently, 'not, as at present, turned loose after *punishment* upon Society.

These suggestions have little in common with the sentimental views which call for violence. The humanitarian, often enough accused by the unthinking of an overweening tenderness for the criminal, is not primarily concerned with the criminal at all. Faced with recidivism, or the plain failure of current methods ; with the fact, as Romilly pointed out some fifty years ago, that "Cruel punishments have an inevitable tendency to produce cruelty in the people"—and so to produce further crime ; with the obvious success of the more rational methods of reclamation, illustrated by the Borstal and similar systems ; the humanitarian works for the establishment of a new view of crime as disease, and which, rejecting the older tribal and primitive notions with their demands for revenge and deterrence by fear and punishment, shall view this problem in the light of modern science, penological fact, and that ethic which is summed up in the expression the newer social consciousness.

## II.—ON RECLAMATION AS A PENOLOGICAL METHOD.

IN considering the demand made by humanitarians for the acceptance of the principle of reclamation in the treatment of criminals, it is well to define what we mean by crime. For there is constant confusion between an immoral act and an illegal one, between anti-social acts, and those that the laws make criminal. A criminal act is nearly always an anti-social one, but the reverse is by no means true if the term criminal be confined to its legal sense. That capitalistic system to which society has at present evolved, gives vast scope for anti-social acts in the form of trusts, and combines, and corners, and these acts are not illegal, and are not, therefore, properly described as criminal. Society, one may say, is not ripe for their criminalisation. The men who commit them, so far from bringing discredit upon themselves, are still the respected, the honoured, the titled, of civilized mankind. They, at any rate, wield the power of the State and the industrial machine, and there is a long row to hoe before they will come to be counted by law with the criminal classes. The law as it stands reflects the main drift of public opinion, an opinion which does not rise to any very high ethical level. The moral law, considered from any altruistic standard, and British law, are very far from being the same. So,

then, we must consider crime as anti-social action, which is recognised as such by the law of the land, and punished accordingly.

Now, the man who commits an anti-social act of this kind sets himself in opposition to one of the most ancient of instincts—the instinct of tribal self-protection. The instinct of the primitive tribe is to destroy such a man, and though the ages of growing civilization have somewhat modified this instinct, yet the desire to punish, sometimes to the death, is still a common enough trait in social psychology. The laws of civilized countries very largely reflect this feeling, not to speak of lynch-law, which every now and again determines the fate of some anti-social, or supposed anti-social, individual. Or it may be of some individual, acting in direct opposition to the low ethical consensus of opinion of the general public (*i.e.* the tribe), as embodied in the law. For, curiously enough, in this matter, the criminal and the social reformer both illustrate the same psychological fact. The tribe hates the person who acts in opposition to its received moral code, be the action good or bad.

But the growing consciousness of democracy, by which is meant the growing consciousness on the one hand of the meaning of social relations, and on the other of the right of the individual to be an end in himself, apart from all considerations of class or sex or race—that awakening of the democratic sense which began for Western Europe in the great French Revolutionary period—is gradually bringing about a new conception of the criminal, and of his just treatment by society. We grow more and more aware of the fact that biological science and economics, as well as ethics

and religion, impress upon us as truth that no man lives, or can live, to himself alone. Anti-social action, criminality, has a cause which is rooted in the conditions of society, and for which each and all are responsible. This, let it be said, is not to plead an irresponsibility of the individual, to weaken his moral sense. If society makes the individual, the individual also makes society. But if the individual organism be called upon for moral effort and sane and rational conduct, so also may we call for higher intelligence in its conduct on the part of the social organism. And a consideration of the great extent of social responsibility should stimulate to a more rational, social and humane action on the part of society in its treatment of criminals.

Turning to a practical illustration of this question, it may well be asked:—Could anything be more irrational and futile than the convict prison system as at present carried out? Presumably the modern justification for penal servitude and kindred punishments is the outraged moral sense of the community seeking to deter and to protect itself by the infliction of pain and suffering. But consider the results. The stupefying and deadening moral effect of such places as Portland, Parkhurst and Princetown, simply works to produce an appalling recidivism,\* and does nothing, or but

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\*RECIDIVISM.—On the question of recidivism the following from the Report of the Commissioners of Prisons, 1912, is instructive:—

“If the total receptions on conviction during the year be taken (*i.e.* of sentences to penal servitude, Borstal detention, and ordinary imprisonment), viz.:—124,399 males and 34,468 females, the returns show that a total of 75,268 males and 26,204 females had incurred previous convictions, or a percentage of 60·5 and 76·0, respectively, while 39·5 and 24,

little, to hinder the ever-continuous stream of crimes, violent and otherwise. For such diminution of crime as there is, is not due to prisons, police and punishments, but to the rise in social and humanising conditions outside the penal system. Prisons, with their degrading punishments, only further degrade a man, producing fitness, as one report of the Borstal Association has it—"for nothing but further terms of imprisonment."

Thus Sir Godfrey Lushington, Report of Departmental Committee on Prisons, 1895: "I regard as unfavourable to reformation the status of a prisoner throughout his whole career; the crushing of self-respect, the starving of all moral instinct he may possess, the absence of all opportunity to do or receive a kindness, the continual association with none but criminals, and that only as a separate item amongst other items also separate; the forced labour, and the denial of all liberty. I believe the true mode of reforming a man or restoring him to society is exactly in the opposite direction of all these; but, of course, this is a mere idea. It is quite impracticable in a

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respectively, had not been previously convicted. Of this large number who had been previously convicted—

|                                                               |   |       |   |   |   |               |
|---------------------------------------------------------------|---|-------|---|---|---|---------------|
| 40,449 males and 11,271 females had been previously convicted |   |       |   |   |   |               |
|                                                               |   |       |   |   |   | 1 to 4 times. |
| 3,964                                                         | " | 1,656 | " | " | " | 5 "           |
| 12,735                                                        | " | 4,614 | " | " | " | 6 to 10 "     |
| 10,295                                                        | " | 3,624 | " | " | " | 11 to 20 "    |
| 7,825                                                         | " | 5,039 | " | " | " | above 20 "    |

So also is the following from *The Times* of January 20th, 1913 (case of James Orpin, labourer, at the Bedfordshire Assizes, for poaching). "Orpin, who had been *sixty-five* times summarily convicted for poaching, he (the judge) sentenced to 18 months' hard labour."

prison. In fact, the unfavourable features I have mentioned are inseparable from prison life."

The fact is, the more severe the punishment, as punishment, the less likely it is to have any effect in diminishing crime ; nay, the very reverse. Dr. Douglas Morrison, the well-known Rector of St. Marylebone, and himself for many years a prison chaplain, has forcibly written :—

"If the penal laws of the past teach us anything, they teach us that crime cannot be put down by mere severity. Consult the statute book, and you will find that hanging, branding, burning, mutilation, used to be the punishment for offences which are now dealt with by a petty fine. Did these atrocious punishments put a stop to the crimes they were directed against ? We know, as a matter of fact, they did nothing of the kind. These penalties had no effect, because crime springs from conditions which punishment cannot touch."

Now, surely, from the practical standpoint, it is better to try and make good citizens of men and youths who have never had more than half a chance, as all prison statistics show is the case with the vast majority of prisoners, than to brutalise and degrade for a term of years, by a machine-like treatment, with the certain result that at the end of the term they will commit other crimes ; having lost their individuality, their self-respect, and their will power in the process of serving their time, and having received no sufficient stimulus to live any finer or more social life. For this must necessarily be the case in an institution whose primary object is one of punishment.

Reclamation, as the object to be aimed at, in

the treatment of every prisoner capable of being reclaimed, is a penological policy at once more reasonable and humane, and vastly more in the interests of an intelligent and civilized community, than the hopelessly inefficient method of punishment—of society conceiving itself to possess some divine attribute of justice. For, as Alfred Russel Wallace has truly said : “ We never can know all the complex forces which drove the guilty man to the fatal deed.”

It is just to recognise that considerable efforts are already being made in the direction of reclamation. The system in vogue at Borstal and some other prisons, for young male offenders is frankly based on a reformatory ideal, and has met with very great success. Since the Borstal system was introduced, some hundreds of youths have been saved from falling into the class of habitual criminals or recidivists. But this system needs to be extended to older prisoners, as has already been done successfully in some American prisons, for age is not the only factor that ought to be considered.

But some prisoners are beyond reclaiming ! True, but then what sense is there in punishments, short or long, for people whose minds are so abnormal that they cannot be reached by any social stimulus, or so weak that they cannot resist the criminal tendency ? To send such to a convict prison for a term of years at a heavy expense to society—to a convict prison like that on Dartmoor, with its harsh mind-destroying “ system ”—and then, by this admirable plan, having further degraded and weakened them from what they were when sentenced, to let them loose on society, is surely the climax of penological

absurdity. The obvious treatment for persons who are incurably diseased, in a moral or mental sense, is to segregate them, and in reasonable and kindly conditions, to detain them permanently. But these will prove to be a comparatively small proportion and, with the advance of social conditions, a diminishing number.

The objection often urged against detention beyond a limited and determined period, is not an objection to detention *per se*, but to detention which is synonymous with prison and punishment. When the penological institute is freed from these futilities of barbarism, and partakes of the nature of hospital and asylum, with intelligent helpfulness and trained treatment, and with the ever present possibility of cure and of return to normal conditions, the objections to socially imposed segregation will largely disappear. For Help, and not Hindrance, will have then become the animating motive of Society's action towards the criminally disposed.

### III.—THE TREATMENT OF HOMICIDAL CRIME.

THAT the penal codes of civilized nations are invariably behind the moral sentiments and humane tendencies, if not of all, of the greater part of the peoples of those nations, is perhaps a natural condition of things. Any comparative study of the criminal laws of various countries does but serve to emphasize the fact. The dread hand of the law lies heavily upon us, and, considered from an ethical standpoint, particularly the criminal law.

The treatment meted out nowadays by an intelligent parent to the offence of a child, and that which obtained in the past; the treatment of wrongdoing in school life now and in the days gone by; illustrate the growth of ideas in regard to punishment. True, there are still parents and teachers who for every offence, or for very many offences, will rush to violent punishments. In most of the great historic public schools for boys in England, for example, corporal punishment is still maintained, partly as a tradition and result of a conservative habit of mind but chiefly because of the still lingering belief that lies at the root of all punishment, that fear is the greatest or a very great factor in the making of the moral man.

But we may at least flatter ourselves that this

method of dealing with moral evil is becoming obsolete. We smile to-day at the story of the renowned Dr. Keate at Eton saying to some of his pupils :—" Be pure of heart, boys, or I'll flog you ! "

The newer schools do not use such methods, and the products of these schools may fairly challenge comparison. For children so educated a finer sense has replaced the older physical fear to do wrong. For there is fear and fear, the fear of external results leading to punishment and the higher fear of self-condemnation.

Like school like parent. The thoughtful parent who cannot place the fear of God's wrath, and still less the fear of the rod, before the child, is not devoid of means to the making of the moral being. Rather he is in the stronger position, for he sees what apparently the older schoolmaster and the older parent did not see, or did not trouble to see—that the ill of an act does not lie in the act *per se*, but in the state of mind that found expression in the act. Hence the fundamental idea of punishment, fitting a consequence to an act, becomes for him an obvious absurdity. For none can say what the penalty is that would balance the evil deed. The doer of the deed is not to be punished for an evil act, but to be treated for a condition of mind which is opposed to the good of the larger self and, resulting therefrom, of society. Such treatment, as in bodily ills, may need to be hard, even repellent, and will appear to some to be practically the same as punishment. But the actuating motive is quite different, and the moral results also.

And if this is true of ill-doing children, how much truer is it of criminals ! And here I may remark that the term *criminals* must be taken to

mean criminals who are caught, for it must be obvious to everyone that there is no real line in an ethical sense between criminals and the rest of society. "The seed of criminality," as it has been said, "is in each of us," and indeed if criminality means anti-social action, there is very much more than the seed in many eminently respectable people. But using the word "criminals" in the conventional sense, I suggest that our methods of dealing with such are very largely crude and obsolete and, for ethical purposes, useless in the extreme. And as it is the child's state of mind in the performance of a wrong act that is the essential factor, and not the nature of the act in itself, and since that state of mind is so complex a matter that even when we consider it with every sympathy we find it most difficult to deal with, so is it even more true of the criminal and the complex forces of his mind and environment. And this should surely give us pause in our readiness to assign punishment for wrongdoing.

And yet, though we all know that this is so, and whilst even old-fashioned criminologists tell us emphatically that the punishment for crime theory is a mere absurdity and a practical failure, the criminal codes of Europe and America show but small advance in the direction of a more intelligent idea in regard to this gigantic and ever present problem, the problem of the criminal and what to do with him.

This is borne out by a study of a Return upon Homicidal Crime issued by the Home Office.\* This document is an account of the various punishments for this crime provided by the penal

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\* Return of Punishments for Homicidal Crime Abroad, 1908.

codes of France, Germany, Austria, Hungary, Spain, Italy, Holland, Belgium, Sweden, Norway, Denmark, Switzerland, Portugal, Russia and the United States of America.

The English student of penology will take up this Return with much interest and hope, but will put it down with no little despair. Surely, he will think, if we English are "stupid in these matters," as John Bright told us, from other States we may learn wisdom. He will indeed find *some* wisdom, chiefly from one or two of the smaller nations, but what a field of unintelligent brutality, what a weary round of hangings, guillotinations, stranglings and electrocutions, of chains for life, of *travaux forcés à perpétuité*, *schwerer Kerker* and deportations. And all this huge system of law and the infliction of the penalties of the law, from Moscow to New York, from Munich to San Francisco, from Madrid to Copenhagen and the North—and yet, throughout all the codes of all the nations included in the Report, no suggestion of intelligent understanding or desire to understand what *is* homicidal crime, its cause, its cure and its prevention. Only the dull and stupid round of punishment for crime, penalty for act, the gallows and penal slavery. The *legally* insane alone receive treatment for their disease, and that, not because of any effort to understand homicide, but because legal insanity is not now ferociously punished as in the merciless days before the French Revolution.

Take the comparatively simple question of infanticide by a mother, usually by a girl who has been seduced and abandoned. Any intelligent, sympathetic, humane man, let alone a woman, knows that here is a tragedy of mind, a madness,

an intolerable grief and depth of despair. For no sane person believes that a sane mother deliberately kills her offspring. Here is disease, a sickness to death. If in such a state of mind the mother destroys herself, all people, even the unintelligent, pity her; and in England the coroner's jury invariably gives its verdict of temporary insanity.

And how do the criminal codes of Europe deal with these unhappy ones? What treatment for this disease do the laws of Europe provide, or what moral understanding do they show in the matter? England issues sentence of death and France death; Germany, three to fifteen years' penal servitude, Austria, ten to twenty years' hard labour; Hungary, five years; Italy, three to twelve years; Holland, up to nine years; and Belgium, from ten years' penal servitude to death. I cannot find that American law, any more than English, even distinguishes infanticide from other kinds of murder, except perhaps in those States where gradation of murder crimes has been introduced and where it is probably murder in the second degree with penalty of penal servitude. These penalties are all based on the punishment-for-crime theory. What or who or how the prisoner is, what she needs and has needed, what society owes her, what change can be effected in her mental conditions, what society owes to itself in the matter of making her again a sane and intelligent member of the community—all these most essential factors do not come into the codes at all. And so a stupid and useless and soul-destroying punishment, supposed to fit the crime, is inflicted. The law remains still in the Middle Ages.

In this Return we have some thirty or forty foolscap pages of punishments—penalties of chains, of hanging, of slavery—but never a suggestion of curative treatment to be applied. One would think that crime, like insanity and hysteria in the old days, suggested nothing to jurists but punishment. It is true, of course, and gladly to be admitted, that if we could put all modern ideas with regard to the criminal on one side, and could frankly accept the punishment-for-crime theory, then these European and American codes do most certainly show an advance, and a great one, on the ideas of criminology held by our forefathers a hundred years back. The awful punishments of the eighteenth century have nearly all been effectually uprooted. From the moment when Voltaire, with sleuth-hound remorselessness, took up the cause of the unfortunate Calas, the days of such infamies as breaking on the wheel were numbered, and penalties such as gibbeting, which a Whig government revived in England as late as 1832, would not be tolerated in any part of civilized Europe or America. The civilized public is ceasing to believe in brutality, if it has not yet become intelligent enough to desist from it. It does not want, except in some cases, to illtreat the prisoner, but a selfish fear backed by the conservatism of officialism and legality makes any change a difficult thing to bring about.

The most hopeful sign indicated by this Return is the fact that all the more advanced countries in Europe, England of course excepted,\* have introduced gradation of murder crimes. Details are

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\* "The lamentable defect of our system in not distinguishing degrees of murders."—*Times*, April 4th, 1913.

not given for every State in the American Union, but at least sixteen of those mentioned recognize murder in the first and second degrees. And this I take to be a great advance, for it means that even the crime of murder is being brought within the scope of penal reform. Murder in the second degree will come within reforms in the direction of indeterminate sentences and curative treatment. This is also the case in regard to the first degree in those enlightened States that have finally parted with that remnant of a barbarous age, the public executioner.

It is interesting in passing to note these latter countries, mainly at present the smaller ones, where advances in general education and the spread of humane and ethical tendencies are more easily effected. Thus in Europe: Holland, Belgium, Switzerland, Norway, Denmark and Rumania; in the United States: Maine, Kansas, Michigan, Wisconsin, and Rhode Island; and in South America, Uruguay may be cited. To these must be added Italy and Portugal. Italy is not a very hopeful example, but it must be remembered that in that country abolition is not so much due to a general advance of the people in humane legislation as to that political unification,

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#### ITALY AND HOMICIDAL CRIME.

Capital punishment abolished throughout Italy 1889.

Proportion of homicides of every kind for every 100,000 of inhabitants up to latest statistics published:—

|      |    |      |      |    |      |      |    |     |
|------|----|------|------|----|------|------|----|-----|
| 1889 | .. | 13·3 | 1895 | .. | 12·4 | 1901 | .. | 9·8 |
| 1890 | .. | 12·0 | 1896 | .. | 12·3 | 1902 | .. | 9·8 |
| 1891 | .. | 13·0 | 1897 | .. | 12·7 | 1903 | .. | 9·4 |
| 1892 | .. | 14·4 | 1898 | .. | 11·8 | 1904 | .. | 9·1 |
| 1893 | .. | 14·1 | 1899 | .. | 11·2 | 1905 | .. | 8·5 |
| 1894 | .. | 12·7 | 1900 | .. | 10·8 | 1906 | .. | 7·8 |

These figures are supplied by Prof. Ruata, of the University of Perugia.

when the law of Tuscany in regard to this matter—a law which was the work of the great jurist, Beccaria—became the law of United Italy. And thus Sicily, which, up to the time of the union maintained the penalty of death, is reported to produce some ten times as many murders in a year, in proportion to population, as Tuscany, which has had no such penalty for a century.

Switzerland offers a better example from an English point of view. The Federal Parliament abolished capital punishment in 1874, but in 1879 the right of the Cantons to severally restore it was allowed. Eight did so, but none has ever actually carried out an execution. As in Denmark and Belgium, where the law of death is still on the statute book, public opinion has advanced too far. Holland and Norway have no death penalty, and homicidal crime in these countries has steadily decreased of late years. The case of France is an interesting one, for here there was a struggle between the humane and moral perceptions of an intellectual class, to which President Fallières himself belonged, and the selfish fears and unintelligent brutality of the public accustomed to public executions. The fact of an increase in violent crime, due to the laxity of the administration of the law and its consequent uncertainty, was a point in favour of the reactionaries. Moreover, violence, whether in demanding flogging or hanging or the guillotine, always finds a support in playing on the selfish fears of the unthinking. The death penalty in France, after nearly two years suspension, was reintroduced.

But obviously with the advance of penological reform and the transmutation of methods of punishment into reformatory and curative ones,

the penalty of death will have to go. Perhaps the introduction of gradation, or the adoption of indeterminate sentences or simple disuse will bring this about. Whatever the method, once the idea of punishment for crime is given up there can be no moral excuse for this ugly remnant of the good old times.

It would occupy too great a space to deal with half the issues in ethical conduct suggested by this Return, that is to say in regard to the State's attitude towards homicidal crime. I will mention but two, for they are characteristic. In Germany whoever kills his opponent in a duel is not punishable for murder or for manslaughter, but for duelling. The punishment for this is detention in a fortress for two to fifteen years. This is indeed one of those peculiar moral inversions due to military ideas. The German who kills a man in a passion commits *Todschlag* and is sentenced to five or more years of penal servitude ; but if, using his military training, he acts more cautiously and challenges the man he desires to kill to a duel, he will get off with two or more years detention. The French law, more logical in this matter, treats homicide in duelling as murder punishable by death. The practice, however, is probably much the same. Certainly we never hear of the execution of a French duellist.

Again, according to Arts. 327 and 328 of the French Code, it is laid down that "homicide" commanded by the law or by legitimate authority is not a "crime." Could anything better illustrate the absurdity to which the theory of punishment for crime has been reduced? For if the moral ill lies in the act, as all criminal law at present supposes, and not solely in the mental

condition of the criminal, how can a criminal act cease to be so by giving legal authority for it? If murder, lying and theft are moral ills, they are such whether sanctioned by one man or a dozen or a nation. Either, with Nietzsche, we must get "beyond good and evil" and find a new basis for our moral life, that is to say abolish ethics altogether in favour of the doctrine of the "blond beast," or more and more we must come to recognize that our individualistic conceptions of good and evil must be socialized, and made applicable, not only in the relationship of man with man, but of man with the State, and of State with State. And this, indeed, is the trend of all modern civilized life. And, as to the cause and cure of crime, a very true word has been spoken by Dr. Morrison, whose long experience gives force to his words:—"Crime springs from disorders in our social system, and until these disorders are healed or alleviated, crime will continue to flourish in our midst, no matter how severe and strong you may make the penal law. Some of these disorders consist of physical or mental infirmities; some of economic hardship or vicissitudes, and some in the low standard of life and conduct which prevail in our midst. The true method of diminishing crime is to pluck it up by the roots. And the only way to pluck it up by the roots is to alleviate the social disorders by which it is produced." This is a more rational, historically justified and sane view of the case than that foolish proposal, supported by some eminent persons, of capturing the so-called professionally criminal class and shutting it up permanently under lock and key. For prisons, police, and punishment do not effect that moral

and social change without which crime, like all other evils, springs up perennially. As a writer in *The Nation* very truly remarks: "At bottom, the criminal problem is not so much a penal as a social problem."

Such a Return as that I have referred to, impresses one with the crying need for the application of a larger moral conception of penology and criminal law, or rather moral *and social also*. Present methods are evil both in the treatment of homicidal or other crimes, and both as regards the individual and society. And this is chiefly or entirely due to the absolute lack of any intelligently ethical basis. Criminal law is as haphazard as civil law. Two deeds entirely similar in the ethical reaction entail social advancement in the one case and penal servitude in the other. The worst criminals are not always those that are convicted, nor the worst murderers those that are executed. And those that are imprisoned and suffer penal servitude under present conditions are weakened in every moral, social and humane instinct by their treatment instead of being strengthened thereby.

" But this I know, that every law  
That men have made for Man,  
Since first Man took his brother's life  
And the sad world began,  
But straws the wheat and saves the chaff  
With a most evil fan."\*

What, then, it may be asked, should be the treatment accorded to the homicidal criminal? Well, in the first place, it must be *treatment* and not mere punishment for crime. And in the

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\* *Ballad of Reading Gaol*: Oscar Wilde.

second place, this treatment must be based on a much more elastic interpretation of the legal definition of insanity. We must recognize that the thoroughly normal man, the sane man, is much rarer than we try to believe. Thirdly, we need an extended recognition of social responsibility. With the advance in social consciousness we shall come to see that "society itself is the primary cause of murder," as Dr. A. R. Wallace tells us. And when this is recognized, and treatment replaces punishment, much more intelligent, trained and sympathetic staffs must replace our present prison warders, so that such treatment may be administered in a manner at once wisely firm and intelligently humane. I do not pretend to dogmatize as to the content of such treatment system, but often in these cases the simplest remedies are those most needed and most lacking in prison life—humane and healthy diet, open air, stimulating occupation, sympathetic teaching and wise control—all these factors, the antitheses of those provided by our horrible town life and often village life also. These are the remedies for the diseased homicide, with his heavy mental cloud and uncontrolled passionate nature.

Perhaps the time is not yet ripe for so complete a change. Nowhere, indeed, in his social life, does civilized man so greatly need an ethical uplift, as in his dealing with the penal problem. The hope of the future lies in the fact that never before has he so greatly realized it, nor have so many given of time and thought and energy to the bringing about of reform. For with realization of an ill comes insistence on a cure, and when this is insisted upon, the nature of the cure should not prove beyond the capacity of science and morality.

## IV.—THE LAW ON ITS TRIAL : AN HISTORICAL RETROSPECT.

SOME eighty years ago a man was tried in Lincolnshire for stealing a horse. In those terrible old days the crime was a capital one. Executions in public were counted by the dozen, and it was no uncommon sight at Tyburn, or on any lonely common, to see the bodies of three or four men and women hanging in a row.

This unfortunate man, therefore, was in imminent danger of the gallows. Eleven of the jurors were for hanging, but an obstinate old farmer, one Buffam by name, refused to agree to this verdict, and the jury was in consequence locked up. The eleven jurors tried arguments, but failed to move old Buffam, although we are told that "hunger sharpened the wits and pointed the logic of his eleven companions." Then "they tried persuasion ; it failed—' he wouldn't hang a *man* for stealing a *horse*, not he, let what would happen.' They tried threats, but Buffam was too sturdy to acknowledge a fear. At last they humbled themselves to entreaty, and pleaded that they were starving. ' Well, starve ! ' said Buffam. ' We shall get nothing to eat till we return a verdict ' was suggested. ' Never mind,' he retorted, ' I'll eat the ceiling, but I won't give in ! ' This vow settled the dispute ; consciences were

adapted to circumstances, and 'not guilty' was returned as the verdict of them all. However, the affair was not soon forgotten, and the old farmer went by the name of 'Eat-the-ceiling-Buffam!' for the rest of his life."

The story is interesting as showing the rise in the earlier part of the nineteenth century of a humanitarian feeling, an immediate product of the Revolutionary teaching of the great days of 1789. The working of the bloody code of the age was being threatened in more than one direction.

"The Law on its Trial; or, Personal Recollections of the Death Penalty and its Opponents," by Alfred H. Dymond, a little book published in 1865, and which has long since passed out of print, gives a graphic account of the struggle which took place for a less terrible code right through the first half of the nineteenth century.

It is significant, perhaps, that one of the principal leaders in this movement, John Thomas Barry, was born in 1790. This Barry founded, in 1828, the Society for Diffusing Information on the Subject of Capital Punishment. It was certainly needed. In 1829, in London alone, twenty-four persons were publicly executed for various crimes other than murder, such as forgery and theft, and as late as 1837, 438 persons received sentence of death in a single year.

It is astonishing, as one looks backward, to note how much our ancestors believed in fierce punishments, and particularly in the death-penalty as a method of government. What thousands, indeed, of English folk have been flogged, starved, hanged, and mutilated often for crimes of quite a minor order, or by mistake, or by miscarriage of justice. And when humane people revolt from

such modern cruelties as the Denshawai hangings and floggings and imprisonments, it is just to such men as Sir Edward Grey and Lord Cromer to remember that their class, the governing people of England, has only just begun to think other methods to be possible in dealing with the common people at home or abroad. Humanitarianism does not yet go very deep even as a basis of personal conduct, and still less as a method of government. As Verestchagin said with justice in reply to the English critics of his great picture—"Shooting from Guns in India"—a picture of the execution of the Sepoy mutineers: "Well, but you would do it again."

It is, indeed, needful to remember that it is but eighty years ago that the Whig Government of the day revived gibbeting. In 1832, the year that Gladstone entered Parliament as a Tory, and as an opponent of the emancipation of the West Indian slaves, the strangled corpses of two men were exposed in chains, one at Leicester, the other at Jarrow Stake. The experiment was not particularly successful. At Leicester, crowds flocked from all the country-side to see the show, and so intolerable a rioting occurred that the body had to be quickly removed. At Jarrow, a ribald and drunken mob expressed unexpected sympathy with the relatives of the gibbeted victim, and certain persons, defying the law, removed the body by night. After that there was no more gibbeting.

But this attempt to terrorise by ghastly brutality, sanctioned, or rather ordered, by the Whig Home Secretary of the day, throws a peculiar light on the general attitude of the governing classes of England. And one need not

suppose that there was any hypocrisy in the charge brought against Sir Samuel Romilly by the law officers of the Crown, when he proposed to abolish drawing and quartering, that he was "breaking down the bulwarks of the Constitution." The "godly butchery," as it was called, based by Lord Coke on a number of Scripture texts, came to an end only some ninety years ago. Women, it is true, were not so mangled. The Constitution, reflecting in a sincere manner that curious sentiment which we know as "British Respectability," found a more excellent way, for, as Blackstone remarks, with an odd commingling of Mrs. Grundy and the savage: "As the decency to the sex forbids exposing and publicly mangling their bodies, their sentence is to be drawn to the gallows, and there to be burnt alive!"

In 1832, forgery, false coining, and stealing were exempted from the capital penalty; in 1833, housebreaking; in 1834, returning from transportation; in 1835, stealing letters from the post office and sacrilege; and in 1837, rick-burning, maiming, arson, and other crimes. These reforms were mainly the work of Mr. William Ewart. They were not all carried on the first proposal; in fact, they encountered fierce opposition.

Thus Lord Ellenborough, speaking in the House of Lords on the Bill to abolish hanging for stealing, said: "Your lordships will pause before you assent to a measure pregnant with danger to the security of property. The learned judges are unanimously agreed that the expediency of justice and the public security, require there should not be a remission of capital punishment in this part of the criminal law. My lords, if we suffer this Bill to pass, we shall not know where we

stand—we shall not know whether we are on our heads or on our feet.”

It is easy to laugh at so fatuous a statement, but precisely the same arguments are brought to-day against the proposal to abolish hanging for murder. “What, not hang murderers! I should never have a moment’s peace!” was recently said by an eminent person, oblivious of the fact that only one in four murderers is annually convicted, and one in eight hanged.

In the course of his most interesting but tragic story, the author of “The Law on its Trial” gives us a graphic account of the case of a small boy, aged *nine*, who, in 1833, was convicted at the Old Bailey of housebreaking, and sentenced to death. This wicked criminal had seen some sweets inside a broken but patched-up shop window. Pushing a stick through the patch he obtained the coveted sweets, and shared them with his playmates. But this was housebreaking according to English law; and we must suppose that it was in support of the “bulwarks of the Constitution” that this unhappy little creature was dragged before Mr. Justice Bosanquet, and, with all the horrifying accompaniments of an Old Bailey trial, sentenced to die. Mr. Dymond laconically remarks, “He was not executed.”

This case must have occurred about the same time as Lord Ellenborough’s speech just referred to. We do not know how confused were his lordship’s thoughts on hearing of it—whether he felt he was standing on his head or no; nor those of the stony-hearted judge, who could record so monstrous a sentence. But such things were apparently approved by many in authority. Two years before, Earl Grey being Prime Minister,

a boy named John Bell was hanged at Maidstone, aged fourteen !

In 1837, however, Lord John Russell was able to pass certain Bills which practically limited the death penalty to murder and attempts to murder, although seven other crimes were still capital until the passing of the Criminal Law Consolidation Acts in 1861. In fact, after 1841 there were only two executions for crimes other than murder. There was an immediate drop in the number of death sentences consequent upon the passing of Lord John Russell's Acts. Thus 1837 saw 438 such sentences, but in 1839 the number had fallen to 56.

Lord John Russell was a consistent friend of humane reform in the criminal law. Not only did he pass these modifying Acts, but he freely expressed himself in favour of the complete abolition of the death penalty. "For my own part," he said, speaking of this question, "I do not for a moment doubt either the right of a community to inflict the punishment of death, or the expediency of exercising that right in certain states of society ; but when I turn from that abstract right and that abstract expediency to our own state of society—when I consider how difficult it is for any judge to separate the case which requires inflexible justice from that which admits the force of mitigating circumstances—how invidious the task of the Secretary of State in dispensing the mercy of the Crown—how critical the comments made by the public—how soon the object of general horror becomes the theme of sympathy and pity—how narrow and how limited the examples given by this condign and awful punishment—how brutal the scene of the execution—I come to the

conclusion that nothing would be lost to justice, nothing lost in the preservation of innocent life, if the punishment of death were altogether abolished."

But though there was a drop in the number of executions after the Acts of 1837, many horrible cases continued to occur from time to time. Home Secretaries were hard-hearted, more especially Sir James Graham, a most pitiless man, possessed by a great belief in hanging. In 1843 he insisted on the execution at Stirling of an old man of eighty-four years of age, named Allen Mair. Sir James Graham on every possible occasion set himself firmly against the granting of reprieves. Queen Victoria in her coronation oath had sworn to administer "justice in mercy." *Punch*, with much reason, cartooned the legal ruffian who occupied the Home Office as "justice in granite."

Lord Palmerston, who was Home Secretary somewhat later, had a much more humane mind, and evidently felt greatly the burden of the constant death sentences. On one occasion John Bright had made a tremendous attack on him in the House of Commons. Upon arriving home Mr. Bright had the case of an unhappy man, under sentence of death, brought strongly before him. John Bright was a most thorough-going abolitionist, and the case appealed to him. The next morning at 10 o'clock he sent an urgent appeal to Lord Palmerston, detailing the facts that, in his opinion, would justify a reprieve. A reprieve was granted, Lord Palmerston sending him a courteous note to that effect at noon.

Palmerston, in fact, seems to have been ready to make use of any good grounds for mitigating

the brutality of the law. Unlike Sir James Graham, he reprieved an old man at Liverpool on the ground of age, some abolitionist supplying him dexterously with a precedent for such a proceeding at the right moment, when he was hesitating between the law and his better feelings. On this occasion the mob, brought together for the debauch of brutality which an old-time public execution meant, became furious at being disappointed (for the reprieve only arrived at the last moment), and vented its rage by violently attacking Thomas Wright, the Quaker prison philanthropist, as he left the gaol, supposing him to have been the cause of the reprieve.

A truly horrible execution, and one that must have done much to put an end to public executions, occurred in 1856. The wretched prisoner raised himself four times in succession after he had been cast off, resting his feet on the side of the drop. The mob began to yell dangerously, the trembling sheriffs raged at the hangman, and finally the miserable Calcraft, whose life had been previously threatened, flung himself in desperation on the man, and by sheer weight strangled him, amid fierce cries of "Murder!" from the drunken and enraged crowd.

What a public execution in old days was almost beggars description. A graphic account, drawn from Mandeville, has been given elsewhere :\*

"On the morning of the execution the prisoners have all been brought up into the prison yard, and a hubbub goes on almost as bad as a Jews' market. Loud curses from angry quarrellers, shouts for the pot-boys, who scuttle about,

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\* *The English Peasant* : Richard Heath.

pouring out ale and other liquids, blows of the blacksmith's hammer, as he pinions those who are going to suffer. At last all is in readiness, the prisoners have mounted the cart, the Ordinary has got up behind, and Jack Ketch in front ; the soldiers press round for fear of a rescue, and the great gates of the prison are swung open.

If it was hubbub within, 'tis the roar of the ocean without. Jack Ketch and his unhappy freight are received with a storm of oaths and coarse ribaldry, in which some of the convicts join, for most of them are already half-drunk. The sorry procession makes its way through a thick mob, which sways to and fro ; the sellers of gin and other liquors bawling loud enough to be heard above the general din. Again and again the hangman's cart stops before a public-house, and while the condemned are taking another draught, the mob rush round them to shake their hands. So eager indeed are the people to show this mark of sympathy, that the struggling and fighting get worse at every stage, until at last the cart is hemmed in. Then heavy blows are struck, pieces of swinging sticks go flying, people are knocked down and trampled under foot, every one gets spattered with blood and dirt ; screams, groans and brutal cries of all sorts produce a tumult beyond description.

At last the cavalcade reaches the gallows, around which a number of hackney carriages are assembled. These vehicles have brought or contain the people's betters, who have thus come by a more convenient route, and secured the best places to see the show. The Ordinary and the hangman dispatch their duties with small ceremony

and equal unconcern, and very soon half a dozen human bodies are dangling in the air."

Such scenes have passed away for ever. The rising wave of humanitarianism which began with the French Revolution has carried us far since then. The *good old days* are over. Yet we still have the hangman with us, we still sentence young mothers and boys to death; and though we have abolished those scenes of horror called public executions, we have failed so far to carry out any of the other recommendations of the Royal Commission of 1864, that last attempt made by Parliament to deal with the death penalty. The efforts of Peter Bedford; of John Thomas Barry; of William Ewart, who introduced the first bill for the abolition of the death penalty in 1840; of Gilpin, who founded the Society for Promoting the Abolition of Capital Punishment; and of Lord John Russell, culminated in the appointment of that Commission. Many then hoped that the end of the *régime* of the gallows was in sight, but Alfred Dymond, who was for some years Secretary of the Abolitionist Society, and who afterwards became a member of the Canadian Parliament, apparently clearly foresaw that the end was not yet. "The Law on its Trial" appeared in 1865, while the Commission was sitting. Its final words were prophetic, and a stirring call for further work. "If," said Dymond, "we can win a successful battle in the complete overthrow of the death penalty, let us not shrink from the conflict; but if, foiled in this, an advance is gained by the limitation of the punishment, let us but use it as a stepping-stone to fresh efforts, unchecked by the secession of any who may be content with a partial triumph. If

we would strengthen the hands of justice, avert the chances of irremediable error, and elevate the standard of the value of human life before our country and the world, we shall not rest till we have wiped from the book of England's laws the penalty that, framed as a terror to evil-doers, has become an abomination and a curse."

NOTE.—The Royal Commission on Capital Punishment of 1864 (just half a century ago !) recommended that there be passed :—

"A short and simple enactment providing that no murder shall be punished with death except such as are particularly therein mentioned.

These should be called murders of the first degree ; all other murders should be called murders of the second degree, and punished as hereinafter recommended.

We recommend therefore :—

(1) That the punishment of death be retained for all murders deliberately committed with express malice aforethought, such malice to be found as a fact by the jury.

(2) That the punishment of death be also retained for all murders committed in, or with a view to the perpetration, or attempt at perpetration of any of the following felonies : murder, arson, rape, burglary, robbery, or piracy.

(3) That in all other cases of murder the punishment be penal servitude for life, or any other period, not less than seven years, at the discretion of the Court."

This Report was signed by the whole Commission, but a declaration moved by Mr. Wm. Ewart was added stating that : " The undersigned members of your Majesty's Commission are of opinion that Capital Punishment might safely and with advantage to the community, be at once abolished."

STEPHEN LUSHINGTON.

JOHN BRIGHT.

CHARLES NEATE.

WILLIAM EWART.

No action has been taken by Parliament since then. We are still where we were half a century back.

## V.—CRIME AND SOCIAL RESPONSIBILITY.

It is in harmony with what one may perhaps call the modern growth of social consciousness, that society becomes more and more concerned with the problem of the treatment of those of its members who fall below the accepted normal standard. The submerged tenth, the insane, the degenerate, the criminal, the problem of these abnormal factors of the social organism becomes more and more insistent with the advance in that order which is the expression of a higher consciousness, social in its inception, humanitarian in its activity. For it is this note of humanitarianism that would seem to distinguish the social instincts of the modern world. The conception of a social being which overrides with a stern imperative the desires and satisfactions of the individual, is no new human concept. Egyptian, Jew, Greek and Roman were each in turn possessed by it. What is new, since possibly the French Revolutionary era, is the extension of this social concept to all humanity, and even to sub-humanity, and its impregnation with the spirit of humaneness.

I need not labour the point, for whatever we may say of the degenerate tendencies of the age, there never was a period in which the question, "Am I my brother's keeper?" was met with so ready an affirmative.

We are astounded at the harshness, the cruelty, the indifference of the past ; and some militant writers, like the Earl of Meath, would have us believe that this arises from our growing feebleness. We have, he tells us, lost our "grit." But perhaps this grit, whose supposed loss he deplores, was but our dullness of spirit with its attendant cruelty ; and a growing intelligence, a humaner, social and human consciousness is the more reasonable explanation of the general revolt against harsh and brutal conditions, for ourselves and for others.

And this is peculiarly true in the realm of criminology. We cannot treat our criminals as we did ; we have moved on. We realize our relationship to them as our fathers never did. We see the social, the moral, the economic factors which produce them, and we know that for these factors we cannot escape our share of responsibility. The criminal problem, as already remarked on another page, is not so much a penal as a social problem. And as we sense our responsibility, we shall seek to understand the problem. How far are we, as a society, responsible, and how far is the individual criminal to be blamed for his acts ? And then, since he is there, what is to be done with him ? For we are not only aware, in a scientific sense, of our intimate relationship one with another, but, as I have said, our modern social consciousness is instinct with the humanitarian spirit. To answer these questions is no easy matter. Problems of social life, of economics, of ethics, of heredity, of freewill, all have to be considered—in short everything that bears on the study of human character and human relations.

In this connection a striking pamphlet by Dr. Bernard Hollander, the brain specialist, entitled "Crime and Responsibility," claims the attention of every thoughtful student of criminology. It is a pamphlet issued by the Ethological Society, or society for the systematic study of human character, of which Dr. Hollander is President.

Now to get at the root of responsibility for criminal acts we must consider the mental make-up of men. Thus there are first the primary inherited feelings which find expression through the brain organization. Whatever the ego, the real self, may be, for all practical purposes of social relationships the self is conditioned by the material organism through which it acts. It is somewhat appalling, indeed, to think how much character depends on physiological accidents. "Thus even a slight injury to the brain may totally change the character of a person; the habitual use of drugs and alcohol may change the disposition; long illness may cause a person to grow less sympathetic and gracious, and more selfish; moreover, a small patch of inflammation in a man's brain may give him homicidal tendencies, while a little softening of a square inch of the cortex may make another a kleptomaniac."

Can the will overcome these adverse factors? Will-power may indeed be strengthened by training, but it is to be borne in mind that it "has no separate existence" of itself. "It is only a capacity of being so powerfully attracted by one motive that other motives become insignificant."—"We do not make deliberate choice; all that our judgment can do is to weigh the various attractions of several motives. The most powerful must certainly prove victorious."

How does this work out? It follows, says Dr. Hollander, in effect, that if we are not born equally good or bad by nature, but that our character depend on (1) our inherited primary feelings, and (2) our inherited will-capacity, *i.e.* capacity of being predominantly attracted by this or that motive, then men have all degrees of moral capacity as they have of intellectual, and as you cannot expect or demand common sense from the mentally deficient, so you cannot ask for normal morality from the morally deficient.

The criminal is a morally deficient being. Is it then reasonable to punish him for his deficiency, for which deficiency he is not responsible?

The only excuse for punishment would be then that its terrorism supplies a powerful element in the "sum total of actuating motives." In this sense it appears to have a practical value to society and so justifies itself to many persons. Punishment in this view becomes merely an expedient deterrent. It is not here justified on any ethical basis.

Dr. Hollander is rightly severe on that absurd thing, the legal test of insanity, or knowing the difference between right and wrong. "The lunatic," he says, "knows the difference as well as we do." It is exactly this which so often "drives him to despair." And then the idea of a hard and fast line between the sane and the insane has long since been given up by medical men. "Persons are to be met with of all stages between the normal and the profoundly insane." Large numbers of criminals are not admitted to be insane when convicted, but their insanity is proved later on. Thus, in England, one in every hundred and twenty-six prisoners is certified

insane, and one in eight comes of insane or epileptic parents. This, by the way, would of itself justify the abolition of the death penalty if our penology were based on scientific and moral grounds.

But there are many stages before we come to the certified insane. Every kind of weak-mindedness supplies its quota of crime. We go on believing in prisons and punishment for these derelicts of society—these mentally deficient—when they commit crimes, whilst leaving them beyond the age of sixteen, “to carry on their existence until the catastrophe occurs which could have been foreseen and ought to have been prevented, and then, as a climax to our proceedings, we hang them to prevent further trouble and for the purpose of warning future evildoers.” Thus, in Manchester elementary schools of forty thousand children five hundred were found to be feeble-minded. The Manchester authorities provide special schools for, and control these unhappy children until the age of sixteen, and then they are left to go their own gait. Thus does society breed its troubles in good truth.

The other classes of criminals, the born criminal, without moral sensibility, by-product of the slums, of the dregs of civilization; and the *accidental* criminal, product of adverse social and economic circumstances—of both of these types Dr. Hollander has much to say that is wise and fruitful, and his words are well illustrated by cases that have come into his hands as a medical man.

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The Mental Deficiency Bill, 1912, which was dropped by the Government, contained some undesirable elements, but it will be indeed a crying evil if a new effort is not quickly made to deal with this question.

The born criminal or the professional criminal is one "whose vocation is crime by a physical and psychical proclivity, a man in whom the selfish tendencies predominate over the moral and religious sentiments and altruistic motives, and whose intellectual powers, instead of inhibiting such tendencies, are employed to further them and to supply means for their gratification. Moreover, such men are usually not influenced by domestic affections, and much too insensible to the esteem of others to be prevented from committing crimes." No doubt true enough, and yet on Dr. Hollander's own showing it is society which is responsible for the production of such beings. Society then must find the remedy and the cure, which one can hardly believe lies in the direction of physiological operation such as some so strongly advocate in these days.

Little need be said of the accidental criminal. There is no way of getting rid of such but by ceasing to produce him. "Economic and social causes largely account for the production of this class of criminals. The rush of life, the competitive system, exciting pleasure, morbid literature, the wealth of the wealthy, the poverty of the poor, the frightful overcrowding of the masses, the continuous labour of married women, working right up to the day of their delivery, and working again within a week of their confinement; all these things help to call into life a race of beings who have neither moral nor physical strength, but also a large number of individuals who are subject to strange whims, delusions and uncontrollable impulses."

All these types of criminals, indeed, tell us the same story of social responsibility and of the great

need for study and experiment in penological treatment. The conclusion of the pamphlet quoted that "crime calls for intelligent and scientific treatment" will be generally admitted by all thoughtful people. Also very largely the further conclusion that the public will in future — "look to the physician . . . for the differential diagnosis between the curable and the incurable criminal." There is only one fault to be found with this view and that is its tendency to be too purely a materialistic, scientific one. For besides physiology and experimental psychology, besides economic and strictly medical questions, are others bearing on crime and social responsibility of psychic and spiritual import. There is always a fear lest the medical criminologist, particularly the brain specialist, be led away by the idea that "brain secretes dog's soul" and man's too; that in the consumingly interesting study of the brain organisation and the bearing of this study on the problem of crime, we may lose sight of the being whose organ brain is; may tend, that is, to think too much in terms of material values. The public will look to the physician, true, but for the sake of a just and broadly human line of action, it is to be hoped, not too exclusively to the physician. For after all the physician is not even an expert in the realm of ethics. And each age develops and corrects its moral standards. A scientific and medical priesthood, exercising large social and legal powers, is no more tolerable than a theological one. We can but resolve to live "im Ganzen, Guten, Schönen," and to apply this resolve to the settling of the lines of social action in their application to the criminal, conscious that here, indeed, we are very specially our brother's keeper.

## VI.—ON FLOGGING.

THERE is no limit to human credulity, and when an Archbishop allows a strong running current of popular sentimentalism to so far overcome his ordinary judgment that he can bring himself to believe that an old abomination like the White Slave traffic, with its roots deep planted in social, sexual and economic causes, is going to be dealt an effective blow by reversion to the discredited barbarism of flogging, it is not to be wondered at that common people, without episcopal grace and understanding, should be found repeating the same shallow dicta that satisfied the House of Lords.

It has long been well known that certain men and women follow the vile profession of souteneurs, of procurers and procuresses of young girls for a trade depending upon and widely supported by the monied classes.

When we are reminded of this fact, which is not in any sense a new fact, when at last an indifferent community is roused to the point of dealing with this abomination, it would seem that our wise senators can think of no more intelligent proceeding than to raise the ready cry of "flog the brutes," meaning thereby the male

agents of this trade, the useful tools of their betters.\*

And yet it must be obvious to His Grace and to others, that, setting aside the moral wickedness of these agents of rich men (and we do not pretend to punish them for what they morally deserve), if it should prove that some or most of them are genuinely deterred by the danger of flogging, the result must be to hand over the dangerous part of the trade to the more difficult partner to get at, the procuress, whom these people who scorn the supposed sentimentalism of the humanitarian cannot or will not flog. The trade, therefore, seems likely to be driven into less trackable paths than it now pursues. And thus we suffer a reversion to old time and discarded methods without any tangible gain.

The introduction of flogging into this Act by a Liberal Home Secretary is a strange lapse from the line of historic progress. It is to be deeply regretted, for it creates a very ugly precedent. If the man who encourages a woman to lead an immoral life for gain, and to satisfy the demands of his employers, is to be flogged, naturally the ruffian who violently outrages a young girl, and perhaps permanently destroys her

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\* "Is there not something of irony in the thought that men of the class that is the cause of the social evil in its worst forms have been voting with righteous indignation for the application of the lash to the backs of men who run the trade, which, but for this class, would not exist? The bully under the lash would be the vicarious victim of the class he caters for. We flog him for supplying our demand. And, in so doing, we seek to shift the responsibility for the gravest crime of the society of which we are the ruling members from our own complacent backs to his bleeding shoulders."—MR. ALFRED OLLIVANT in *The Nation*, December 28th, 1912.

reason, or those who assault little children, or commit other crimes of deep degradation should also be flogged. Indeed, the demand for flogging has become an epidemic, and is called for as a cure for a dozen different crimes—by Quarter Sessions, by magistrates, by newspapers, and by private persons.\* Now the Prime Minister, Mr. Asquith, has more than once condemned flogging. It is to be regretted that on this occasion he had not the courage to override his sentimentally-minded colleagues, and notably the Home Secretary.

The opponents of flogging are of course supposed to be tenderly concerned for the criminal liable to be flogged. Thus the Bishop of St. Albans, in the debate on the White Slave Bill, had the courage to express his preference for the criminal's victim:—"His sympathies were with the victims of the crimes against which the clause was directed, and not with those who might come under the lash." The Bishop, no doubt, felt the rebuke to humanitarian sentiment to be well deserved. At any rate the assembled peerage duly cheered his statement.† This, however, only goes to show

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\* "The regrettable reversion to the barbarous custom of flogging was due entirely to the excitement and indignation aroused by a particularly odious crime which carried people off their feet. At the same time the effect of that wave of insane feeling had been to arouse vindictive passions in all kinds of people who were advocating in the newspapers the extension of the practice of flogging in every direction. The 'floggers dozen' of 'criminals' who, in the opinion of these individuals, called for correction with the lash, included burglars (armed or unarmed), foreigners who insult English girls, daughters who disobey their parents, parents who neglect their children, suffragette prisoners who refuse their food, pit-boys who ill-treat pit ponies, strikers and poachers, motorists who drive recklessly, pedestrians who throw stones at motorists, drunkards, and Mormon elders."

that the Bishops, like most of the Lords Temporal, have no more considered the working out of this matter than they had that of hanging, when, in 1832, the then Lord Ellenborough so graphically beheld himself standing on his head if the death penalty for stealing were to be abolished.

I have endeavoured to show on another page that the supposed deserts of a prisoner constitute no basis upon which an intelligent community can build up its penal code, and that revenge of any kind is out of date. To reformers of the criminal law, flogging as a penal method presents at least two questions, viz. is it a proved deterrent, and, if so, does its deterrent nature outweigh the grave social and moral reactions which its use by society necessarily involve?

Now, in a general way its deterrent quality is a question that is simply begged. The old superstition, still so firmly rooted, accepts as an axiom that violence must deter, though every rational factor in life points in the opposite direction and society has improved exactly as the old brutalities of scourging, branding, gibbeting, etc., have disappeared.

Moreover, as Mr. Asquith has pointed out, its uncertainty destroys its deterrent force (as, indeed, is the case with all such punishments).

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† "The truth, of course, is that the objection to flogging is based not upon mere personal pity, either for the aggressor or for the aggrieved, but upon broad public grounds of morality and experience. To say that those who condemn the lash are "in sympathy with the criminal" is not only insulting, but ridiculous. The same might as truly have been said of those who secured the abolition of bygone instruments of torture—the stake, the rack, or the thumbscrew. Yet who would now have the effrontery to say it? It is only of contemporary reformers that these insolent things are said."  
—HENRY S. SALT : *Fallacies of Flagellants*.

“As to the deterrent effect of flogging, it is impossible to look upon a punishment as really deterrent, if the question whether it will be inflicted in any particular case is no more a certainty than a chance in a lottery. The majority of judges never award this punishment at all.”

So also Lord Chancellor Herschell :—“It was of all punishments the most uncertain, seeing that it was left to the discretion of the judges. There were some judges who would always flog. There were some judges who would never flog.”

In detail it can be shown to fail as a deterrent. The following may be quoted as an example to enforce this point. At the Glamorganshire Assizes held in March, 1908, there were a number of cases of robbery with violence, and a number of flogging sentences were passed. So far from “an absolute stop” being put to such crimes, there were no fewer than eighteen cases of the *same kind* at the summer assizes of the *same year*, and sixteen at the following winter assizes—a fact which was deplored in the local press as a proof that the “cat” had failed. “The desired result,” said the *South Wales Daily News*, “does not seem to have been produced, and now the judges are substituting long terms of penal servitude.”

In like manner the *Western Mail*, in an article headed, “A Black Assize,” admitted that “the fact that there are sixteen cases of robbery with violence will no doubt be quoted by opponents of the ‘cat’ to prove that flogging has no lasting benefit.”

Again, “at the Assizes which were held at Cardiff exactly twelve months after Mr. Justice Lawrence had ordered the floggings above referred to,

a prisoner was charged with the same sort of offence, and it was stated that he had previously received twelve lashes with the cat for robbery with violence"—*Western Mail*.\*

But even if the evidence lent itself to precisely the opposite conclusion, if it could be shown that nothing deterred like the bloodshed and brutality of a flogging with the "cat," it would not affect the humanitarian objection, which, as I have previously pointed out, is not directed mainly to the ineffectiveness of flogging in the immediate suppression of this or that criminal or class of criminals, but to the deleterious reaction upon society of legal violence, to the fostering of viciousness and criminality which such violence engenders. From this point of view there is nothing to be said in favour of flogging. For, in the first place, if the evil of such violence is not obvious to most people, it is perhaps because they are not called upon to perform the act themselves. For it is a truism that many brutalities would speedily disappear if those who profit by them, or think they profit, had themselves to carry them out.† There would be a quick end to the unspeakable sufferings of the fur seal if every lady who wears a sealskin coat had to take part in, or even to witness the manner in which the fur is obtained. The oversea cattle trade under present conditions, *pâté de foie gras* and the miserable Strasbourg geese would be no more if each club gentleman had to serve a term in the

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\* *The Case against Corporal Punishment* (Humanitarian League).

† Unless, of course, they were kept to the work. Habit accustoms men to any and every barbarity.

fattening sheds, or as a transatlantic cattleman. And Bishops would no longer advocate flogging if, as has been unkindly suggested, a Flogging School for young Bishops were instituted and every Bishop had to draw blood, and satisfy the doctor and other prison authorities in a performance at the triangle, on the bare back of a prisoner. But instead of doing these things ourselves, we discuss and approve them in Parliament and the Club, and, in virtue of our economic power direct a lower class of wage-earning seal fishers, cattlemen, butchers, policemen and warders to do them for us. And they would cease, not merely because the horror of these things in the actual would offend the cultivated sensibilities of ladies, clubmen and bishops, but because these being educated in some sort, and not driven to the work by economic necessity, would quickly realize that such occupations degrade and debase the mind; that to engage in them constantly, persistently and for payment involves of necessity a coarsening of fibre, a hardening of sensibility, an increasing indifference to brutality and bloodshed.\*

But there is more than this. The standard of a people's respect for life and for men and women may, in every land, be measured by the standard which is established in the laws and customs of the land. The more humane and intelligent the laws, the more humane and intelligent do the people become. It is glibly said that you cannot make men moral by Act of

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\* One need not take seriously the professed willingness of the Archbishop of Canterbury to engage in the occupation of flogging. Such work is not assigned to Archbishops in England, but to ill-paid warders.

Parliament. In a detailed, individual sense there may be truth in this dictum, but in a social sense it is not so. The men of light, the small minority, establish a national standard when they secure a new and enlightened law. The people, if their conscience, however dimly, sanction the law, gradually respond to it, and a higher social level is reached. Thus, when our grandfathers in 1822 were young men, Richard Martin obtained by persistent zeal the first law in the world that gave protection to the lower animals. For years he fought against mountains of ridicule, contempt, and callous indifference. But the Act 3, Geo. IV. Cap. 71 created a standard, and we have improved upon it gradually, until public opinion to-day is considerably ahead of the simple demands of "Humanity Dick" and would not tolerate the cruelties of Martin's day.

And the reverse is equally true. "Cruelty in the law has an inevitable tendency to produce cruelty in the people." A reactionary penal law cannot be established without producing a backward and downward standardization, without aiming a deadly blow at the civilized level the nation has reached to.

It is for this reason that humanitarians resolutely oppose these reversions to discarded barbarisms, resolutely fight these hangings and floggings and all the paraphernalia of violent physical punishment, certain that men and societies can only advance to humanity and the higher civilization in proportion as they devote themselves to the building up of a temperate, restrained and humane organization of civic life. Certain, also, that the path of reform in criminal law is that which seeks the cure and restoration,

and not the mere punishment, of the criminal. For this view rests upon the wider consciousness of organic unity, which is alike the teaching of physical science and the burden of social ethics, and which should impress upon each of us, in this matter of crime, as in so many other matters, the profound truth of the lesson—"This, too, is thy deed also, for thou and thy brother are one."



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